

**STATEMENT OF DR. BARRY ORTON
PROFESSOR OF TELECOMMUNICATIONS,
UNIVERSITY OF WISCONSIN-MADISON**

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE DIRECTOR

**LOCAL PUBLIC RIGHTS - OF -WAY:
USERS SHOULD PAY THE REAL VALUE
OF VERY EXPENSIVE PUBLIC PROPERTY
(JUST LIKE ROW ON FEDERAL LAND)
AND,
IT'S NOT ONLY MONEY THAT MATTERS**

**FEDERAL COMMUNICATIONS COMMISSION
PUBLIC FORUM ON RIGHTS-OF-WAY MANAGEMENT ISSUES**

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STATEMENT OF DR. BARRY ORTON PROFESSOR OF TELECOMMUNICATIONS, UNIVERSITY OF WISCONSIN-MADISON

Introduction

I am Dr. Barry Orton, Professor of Telecommunications at the University of Wisconsin-Madison.¹ I am grateful to the Commission for inviting me here today to address the issue of just what is “just and reasonable compensation” for access to and remaining in the public’s rights-of-way. Since there is no “one size fits all”² answer to that question, I am more than happy to share with you all some of the considerations local government, the industry and federal courts (but, not the FCC) must consider in making such a determination.³

While my professional training and graduate degrees are in urban and regional planning, for more than twenty years I have run a summer boot camp program to provide “basic training” in local telecommunications administration for industry and local government staff alike. It is that experience that I seek to impart this morning.

Practical Limits of the Commission

While others have addressed the legal bar to the FCC adjudicating rights-of-way management and compensation issues, I seek to highlight for the Commission, the industry and the press just how complex right-of-way decisions are and how the Commission is ill equipped to make such decisions. In enacting Section 253(c) the Congress understood these limitations. For example, in explaining the Feinstein-Kempthorne amendment, Senator Feinstein stated that

the FCC lacks the expertise to address the cities’ concerns. As I said, if you have a city that is complicated in topography, that is very hilly, that is very old, that has very narrow streets, where the surfacing may be fragile, where there are earthquake problems, you are going to have different requirements on a cable entity constantly opening and recutting the streets. The fees should be able to reflect these regional and local distinctions.⁴

Senator Gorton, whose amendment carried the day and is now Section 253 agreed, stating:

¹ I am an original founder of the National Association of Telecommunications Officers and Advisors (NATOA), the professional organization of local telecommunications regulators. I am also on the Board of Contributors of the legal newsletter Cable TV and New Media Law and Finance and the Editorial Review Board of the Journal of Municipal Telecommunications.

² An example of just how one size does not fit all may be found in the City of Milwaukee. Milwaukee streets have ducts that users utilize. Some older ones are over 100 years old and made of wood. Some wooden ducts carry still-used electric lines, some still-used phone lines, some have wires that no one knows what they are; perhaps old trolley or stoplight wires. There are thousands of maps showing everything underground in tens of locations. The last City employee to be familiar with the location and function of most of the functional and some of the non-functional ducts retired last year. The next senior person with expertise in this area has been there for two years.

³ And as if pricing right of way was not hard enough, local government, the industry and the federal courts must address the issue at the close of this first decade of federal, state, and local encouragement of robust telecommunications competition as the market suffers inevitable contraction following a period of unsustainable “irrational optimism.” In such a economic climate, local government’s protection of public safety, public property, and the public’s **purse** in regard to one of the public’s most valuable real assets, the public rights-of-way (**PROW**), must remain strong, even as would-be **users** challenge this protection as an unnecessary barrier to market entry and an impediment to economic growth.

⁴ 141 CONG. REC. S8,171 (1995).

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[T]he Feinstein amendment... does have a legitimate scope. I join with the two sponsors of the Feinstein amendment in agreeing that the rules that a city or county imposes on how its street rights of way are going to be utilized, whether there are above-ground wires **or** underground wires, what kind of equipment ought to be used in excavations, what hours the excavations should take place, are a matter of primarily local concern and, of course, they are exempted by subsection (c) of this section. ... I am convinced that Senators Feinstein and Kempthorne are right in the examples that they give... [a]nd the amendment that I propose to substitute for their amendment will leave that where it is at the present time and will leave disputes in Federal courts in the jurisdictions which are affected.'

Public Safety: Local Government's Lead Consideration

While it is the mission of the FCC and others in government to promote telecommunications choice and broadband deployment, the first order of local government business is and will always be the public's safety. In the context of telecommunications infrastructure deployment, this means a registration and application process for rights-of-way use is the first step. The city must know who is legally responsible, how they can be reached in emergency situations, and what in-house or contracted technical experience is available. Should any entity with a state CLEC certification, a backhoe and a spool of fiber-optic cable be allowed to open streets, bore holes, enter ducts, trench through subdivisions, and string wire between poles? Clearly **not**.⁶

When construction is imminent, an excavation permit is the next step. Maps of the project, plans for street closings, and equipment placement details allow local government to impose reasonable conditions to assure structural integrity, minimize disruption of traffic, and protect surrounding property and people.

Finally, local government must be there all during construction to ensure that not only are all building, fire and life safety codes followed, but that traffic and adjourning business are not unduly harmed or threatened. This last responsibility is an easily understood in Washington, where matters got so bad that the Mayor was forced to establish a moratorium on street cuts until the situation was under control

Public Property Protection'

⁵ 141 CONG. REC. S8,306 (1995).

⁶ Were that this was an academic exercise. Local government has documented for the Commission and others the destruction of water mains, explosions of gas pipes and other disruption of other services, including deaths and serious injuries that construction in the rights-of-way has caused in recent years. In fact, local government created a how to textbook for its members on the issue: *See Local Officials Guide: Telecommunications and Rights-of-Way*, published by the National League of Cities (2002). An illustrative list of such incidents is attached to my statement.

While some industry representatives have claimed that property protection requirements constitute barriers to entry prohibited by Section 253 (a) of the Telecommunications Act, it is rarely providers already in the rights-of-way that feel that way. They want local government to protect their property in the rights of way. In Don Knight's community of Dallas, they recently tracked the enhancement of rights-of-way property protection following enactment of their rights of way ordinance. The table below shows the number of ***times a utility was damaged*** by a

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After the lines have been deployed and the construction has been completed, local government must next ensure that public property is restored to equal or better condition. **All** excavations, trenching and aerial wiring should be in compliance with municipal specifications. These requirements can cover items **as** specific as the size and materials for street patches and the timing of street closings or as general as overall emergency procedures. During and after construction, the city often inspects for compliance, and should have a process to ensure correction of work that does not conform to city standards.

A city usually insists that a PROW user has adequate insurance, signs an agreement that indemnifies the city, posts a restoration bond, and has all related permits. A system of permit denial for causes such as space limitations, public safety hazards, or failure to post bonds or pay fees must also be in place, as well **as** an appeals process.

Examples of PROW management tools envisioned by the Congress as being permitted under Section 253 (c) included such specifics as insurance or bonding requirements, fees to cover the cost of reviewing plans and inspecting excavation work, the specification of types of excavation equipment, and placement of cables underground rather than overhead.’

Reimbursing the Public

As a matter of law, PROW compensation specifics are primarily issues of state and local control, and specifics vary greatly from state to state and from local jurisdiction to jurisdiction. This makes great sense, as geographic and economic conditions that effect the PROW vary greatly from place to place as well.

As a preliminary matter, local management of PROW have costs, both for the jurisdiction and for the user. The jurisdiction’s immediate goal is to have these costs reimbursed for having:

1. Reviewed applications,
2. Reviewed plans
3. Reviewed maps,
4. Coordinated construction plans,
5. Issued permits,
6. Inspected **work** to assure compliance with building, electric and life safety codes,

third party, e. g., a contractor working in the ROW that accidentally damages a phone line, in the year before and the year after enactment of the Dallas ROW Management Ordinance.

	Before ROW Ord Mar2000 to Mar 2001*	After ROW Ord. Mar 2001 to Mar 2002*
Electric (TXU)	39	21
Gas (TXU)	758	406
Phone (SWBT)	21	12
Water/wastewater	64	36

*Numbers reported to staff of the Dallas Public Works and Transportation Dept. by the utility company

⁸ Senator Slade Gorton made clear the broad scope of PROW management tools Section 253 (c) was intended to allow when he stated: “... the rules that a city or county imposes on how its street rights of way are going to be utilized, whether there are above-ground wires or underground wires, what kind of equipment ought to be used in excavations, what hours the excavations should take place, are a matter of primarily local concern and, of course, they are exempted by subsection (c) of this section.”

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7. Closed streets to traffic, and
8. Administered insurance, bonding and restoration

The telecommunications industry largely seeks to limit public compensation for PROW to these direct cost-based fees, declaring them “fair and reasonable compensation,” in the language of Section 253 (c) and therefore any additional payments are unreasonable by comparison. This assertion, the technical term for which is “chutzpah,”⁹ ignores three fundamental elements of local PROW economics and the plain language and legislative history of the Act.

1. Degradation Costs

Proportional costs of street degradation must be recovered. Multiple studies from different areas of the country all conclude that the life expectancy of streets is degraded when they are cut into and reconstructed under current standards.” This degradation shortens the useful life of the street and requires more maintenance and earlier replacement. Therefore, a degradation fee should be charged PROW users based on the current age of the street, any overlays or sealcoats, the current average cost of such work, and the size of the patch, which is the size of the cut plus two feet on each side. To calculate this fee, a jurisdiction needs information on the age of individual streets and improvements and information on the extent of each street cut. The alternative to charging a degradation fee is to adopt stringent restoration standards that truly restore the street to its original condition and life expectancy. Otherwise, the jurisdiction’s taxpayers are subsidizing the PROW users.

Since the costs for street construction, overlays, and sealcoats vary greatly by jurisdiction and street type, as do depreciation rates, it is impossible to create a “one size fits all” national formula for degradation fees. Local governments are the best judge of these actual costs, and should be allowed to remain as the most appropriate agency to set fees that recover these costs.

2. Disruption Factor/Loss of Tax Revenues

The second element of PROW usage costs is a disruption factor to account for public inconvenience during construction. When streets are excavated, or even partially blocked for overhead construction, traffic is often diverted, and local businesses and citizens are inconvenienced and may lose time and/or money. Local jurisdictions must use public safety resources to control traffic, and increased air and noise pollution often results. In addition, local governments lose sales tax revenue generated by the adjourning businesses.

While many of these costs are difficult to measure and allocate, they are nonetheless real. One simple method to recapture some of these costs is based on traffic flow, the extent of the closure and the duration of the closure. Using a common IRS standard of \$.315/mile for vehicle operation costs, a disruption fee can be calculated by multiplying the average daily traffic for each street disrupted by the number of days of construction by the detour distance by the mileage

⁹ A working definition of chutzpah is the defendant, who, when charged with the murder of his parents, begs the court for leniency on the grounds that he is an orphan.

¹⁰ Springsted, Inc., *Public Right of Way Cost Recovery Plan*, Wisconsin Alliance of Cities, September 1997, pp. IV-1-7

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factor. While this method does not capture the business losses nor the public inconvenience, nor the pollution, it does have the advantage of containing a financial incentive for the PROW user to complete the work in a timely fashion.”)

3. Rent

The third element of PROW economics is the most controversial, and the most important. Considering the significant costs of acquiring, developing, and maintaining the PROW, requiring fair market value rental payments is the “fair and reasonable” approach to compensating the public for the use of one of its most valuable resources.

It has been well-established law since the early days of the telegraph in the late nineteenth century that municipalities may require reasonable rentals for PROW use by commercial wireline telecommunications entities.” Even more modern cases that merited Supreme Court review upheld this principle.”

Leaving the attorneys to review the considerable variety of legal cases challenging this approach, it can be generally stated that in no other situation would the owner of valuable property be expected to charge only the incremental costs of occupancy and not compensation reflecting the value of the property itself and the value of the property to the user.

Anything less than fair market value would require the local taxpayers to subsidize users, and would meet neither the “fair and reasonable” criteria of the statute, nor the fiduciary responsibilities of local officials to the taxpayers who paid for the PROW.

(Footnote: The language and legislative history of section 253 is consistent with treating PROW use compensation as rent, with language broad enough to encompass all forms of compensation: cash as well as in-kind services. Rental need not be exactly the same for all users. Just as commercial tenants in the same mall may pay different rents, rights-of-way rental rates will depend on the nature and scope of the space occupied, the services provided to the tenant, the length of the lease, the market conditions at the time the lease was signed, and other reasonable distinctions. Section 253 recognizes that local jurisdictions are free to manage entry and to reasonably set compensation unless and until a court concludes that such terms are inconsistent with the requirements of 253(c).)

¹¹ Id pp IV-8-9

¹² *Charles River Bridge v. Warren Bridge*, 11 Pet. 420, 547, 9 L.Ed. 773 (1837); . See *City of St. Louis v. Western Union Tel. Co.*, 148 U.S. 92, 99, 13 S.Ct. 485, 488 (1893); *U.S. v. King County, Wash*, 281 F. 686, 689 (9th Cir. 1922) (“To the commonwealth here, as to the king of England, belongs the franchise of every highway as a trustee for the public, and streets regulated and repaired by the authority of a municipal corporation are as much highways as are rivers, railroads, canals, or public roads laid out by authority of the quarter sessions. In England a public road is called the king’s highway, and, though it is not usually called the commonwealth’s highway here, it is so in contemplation of law, for it exists only by force of the commonwealths authority,” citing McQuillin on Municipal Corporations, vol. 1, Sec. 227).

¹³ *City of Dallas v. FCC*, 165 F.3d 341, 348 (1999) (“While § 621 may have expressly recognized the power of localities to impose franchise requirements, it did not create that power. . .”)

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Conclusion

Telecommunication development in our free-market economic system often depends on a delicate balance involving public investments, government regulation, and private profit from use of a mix of public and private investments.

These principles have guided the Federal government in its efforts to provide spectrum by means of auction and rights-of-way to federal lands as practiced the Department of the Interior's Bureau of Land Management (BLM).

The BLM captures three different charges for a ROW grant:

1. **Processing fees** to reimburse for the expected administrative and other costs incurred in processing the application;
2. **Monitoring fee** to reimburse for the cost of monitoring compliance, including requirements for protection and rehabilitation of the lands involved; and
3. An annual **rental fee**, payable before the grant is issued and based on the fair market rental value for the rights authorized. These rental rates are based roughly on land values in the project area, are adjusted annually by an economic index, and, in some cases, are established by an appraisal.

Why would the Congress establish a different or more limited right for local governments?

Coda

While arguments over Section 253 proceed in courts, state legislatures, the Congress, and the Commission, local officials continue to enforce the basic requirements that are necessary to assure that public rights-of-way remain safe and functional, with minimal financial burden to taxpayers. These requirements are enforced daily without fanfare **or** debate as we all use the PROW to enable us to heat and light our homes, walk, drive, communicate, access information and entertainment, bathe, and flush our toilets.

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Dr. Barry Orton is Professor of Telecommunications in the Department of Professional Development and Applied Studies, Division of Continuing Studies, University of Wisconsin-Madison. He is a veteran consultant to cable television franchising authorities, and specializes in telecommunications planning and public opinion research in addition to broadband policy and regulation.

Barry Orton was a founder of the National Association of Telecommunications Officers and Advisors, the professional organization of local telecommunications regulators. He directs the UW-Madison's outreach seminars and consulting service in local cable franchise administration and is on the Board of Contributors of the legal newsletter Cable TV and New Media Law and Finance and the Editorial Review Board of the Journal of Municipal Telecommunications.

In addition, Professor Orton has been active in teaching professionals how to utilize the Internet. He is listowner of Telecomreg, the respected Internet listserv dealing with electronic infrastructure issues.

Dr. Orton's PhD and Masters are from Rutgers in Urban and Regional Planning, he also has a B.S. in Business and Economics from Lehigh University. Before joining the UW faculty in 1980, he was on the Rutgers faculty in Journalism and Mass Communications.

**The Case for Rights-of-way Management:
A COLLECTION OF ILLUSTRATIVE INCIDENTS
ARISING FROM STREET CUTS.**

Background

Telecommunications companies are but one of several utilities/providers that reside in the rights-of-way. Telecommunications providers must peacefully co-exist with gas, electric, water, sewer, steam and other telecommunications providers. According to Lee Marrs, president of Texas Excavation Safety Systems, Inc. a nonprofit corporation that serves as a clearinghouse in Texas for underground utilities, such peaceful co-existence is not readily found as there are hundreds of “dig-in” accidents every day.’

Rather than reprint an exhaustive list of such incidents’, local government has collected a series of events, which demonstrates how deployment of telecommunications infrastructure has impacted every other utility/occupier of the rights-of-way. Such lists demonstrate that local government management of the rights of way and requirements for mapping, insurance, bonding and compliance with safety standards and codes are neither punitive nor academic.

I. WaterMains

- Southfield, MI - **9/22/02** Detroit Water and Sewer Dept. Officials blaming faulty underground installation of fiber-optic lines for massive water main break last Sunday that busted sections of Inkster and 12 Mile Roads and caused flood damage to a dozen homes in Southfield’s San Marino neighborhood. It will cost millions to repair damaged roadway and pipes under Inkster Road and officials say it will be at least a month before the road is fixed. An instrument used to drill underground paths for fiber optic lines scraped the 60 inch mains that are between 35-37 years old. The fiber optics were installed by a small telecommunications company that provides telephone and Internet services, and were installed shortly before the intersection was rebuilt two years ago. “the tool got too close to the main. You can’t blame the age of the mains because they are designed to have a life of about 60 years.” The mains are located **20** feet below the road. From the Southfield Eccentric **9/22/02** www.observerandeccentric.com
- Labor Day **2000**, contractors installing fiber-optic cable in central Dallas struck a water main. As a result of the damage, water gushed into the streets and poured into a parking garage below a luxury building, practically destroying two full levels of cars. By the time the flooding ended, the damage was well over \$4.5 million.
- Irving, TX - July **1999** - 4 foot diameter water pipe damaged by fiber-optic contractor boring under State Highway 114 hit the water line. Damage will be billed to Power Plus Directional Boring, the subcontractor that caused the damage. Irving News July **15, 1999**

¹ Quoted in the September 12, 2000 edition of *The Dallas Morning News*,

² We state reprint as such as list does exist and may be accessed at <http://www.underspace.com/acfile/index.htm>

11. Power Lines

- Seattle, WA - 4/27/99 - Power was knocked out for more than two hours to 2,800 customers when a cable-TV worker came in contact with a 26,000 volt electrical line on the roof of a four-story building.

111. Gas Lines

- In Denver, two houses were leveled and another ten damaged in an explosion caused when a construction crew cut an eleven-inch hole in a natural gas line while installing a cable television conduit.
- Mayor Larry Meyer of St. Cloud Minnesota can tell you how sad he was to have to declare Saturday, December 11, 1999 a day of remembrance for citizens of his community killed when a natural gas pipeline was struck by subcontractors digging to install cable lines. Four people were killed, more than a dozen injured in the explosion with property damage in excess of \$1 million dollars.
- In Warrensburg, Mo., near Kansas, City, a subcontractor struck a gas line in July, 2001 sending fumes into a nearby sewer line. The gas spread to several homes. In one causing an explosion in a cloths dryer burning a man over 30% of his body.

IV. Phone Lines

- South Arlington, TX - July 17, 1999 - 3,600 residents and businesses were left without 911 emergency service caused when a Southwestern Bell contractor cut a phone line at the intersection of Barton and Matlock roads.
- In Batavia, NY, telephone service for the entire city (presumably including 911 emergency service) was cut for over twenty-four hours when an inexperienced phone crew severed the main telephone cable serving the city. Local governments are especially concerned with the problems of potential accidents and accompanying liability they will face when they want to access a utility line blocked by the many wires laid by telecommunications providers.

V. Steam Lines

- In San Francisco, where there had been over a dozen similar explosions in the preceding twelve months, a company ruptured a steam pipe underneath a downtown office building. If the explosion had occurred while the building had been occupied, hundreds of people would have been scalded.

VI. Sewers

- Plano, Texas October 14, 2000 - A fiber-optic contractor drilled into a 33-inch pressurized sewer line resulting in what one public works official called "one of our deepest, darkest nightmares." The city was forced to deal with the aftermath of in excess of 4 million gallons of raw sewage that seeped into a local waterway.